BRIEF IN SUPPORT OF PETITION

POINT I

The defendants, we respectfully submit, were not accorded a fair trial.

They were prevented from showing that their acts had neither the intent, nor the effect, nor the power, to constitute the unfair methods of competition charged.

Moreover, they were concluded by the erroneous theory of law that because information as to fraudulent, immoral, illegal or discriminatory practices might influence someone's decision as to a person with whom not to trade, a combination to gather and disseminate such information among its members was unfair competition and an illegal restraint of trade.

(1) This proceeding involved the limited statutory issue (Sec. 5a Federal Trade Commission Act) of whether the foregoing measures adopted by the defendants constituted "unfair methods of competition in commerce" within the meaning of that Section. The case entails no element of price fixing.

To meet this narrow statutory issue so tendered, these defendants sought to show by their Offers of Proof and by their Motion before the Commission to reverse the Trial Examiner's rulings on the evidence that those methods were in fact fair because they constituted purely defensive measures adopted by them for their protection against devious methods for wrongful gain.

Self-protection against fraud and chicanery is not unfair competition or an unlawful restraint of trade.

Defendants offered to prove that these aggressors threatened to destroy defendants by action amounting (a) to common law frauds and cheats; (b) to "unfair or de-

ceptive acts or practices in commerce", declared unlawful by express amendment to the Federal Trade Commission Act adopted in 1938; and (c) to violations in certain instances of the Robinson-Patman Act (Sec. 13, Title 15, U. S. C. A.) (fols. 5185-94, 5497-5507, 4393-6, 4423-33, 790-1, 4758-9, 793-5, 4983-5, 584-615).

The defendants sought to show that it had become the habitual and widespread practice of many retailers to defraud manufacturers and injure manufacturers and other retailers by falsely masquerading as bona fide wholesalers in order to obtain from manufacturers, without their knowledge, the benefit of the differentials accorded to the economic function performed by bona fide wholesalers (fols., *supra*).

(2) Having thus sought to prove that these methods were neither intended nor calculated to effect a conspir cy in restraint of trade and that they were in themselves fair in view of the necessities which they were designed to meet, defendants next sought, by their unsuccessful Offers of Proof and by their unsuccessful Motion before the Commission to reverse the Trial Examiner's Rulings on the evidence (fols. 249-253, 490-2), to show a total absence of power upon their part to effect any violation of the Sherman Act.

The Commission also rejected their offer to show that sales by members of the Institute amounted to not more than 8.05 per cent of the total volume of sales to retailers of dry goods and kindred lines throughout the industry (fols. 5325-31).

(3) In seeking to clarify the status of wholesalers, the defendants not only served the socially useful function of protecting both wholesalers and manufacturers against the perpetration of these dishonest, illegal and discriminatory trade practices,—they likewise performed the valuable service of protecting the bona fide retailer against the usurpation of a false status by his fellow retailer.

The Report of the Differential Committee (R. Ex. 122) emphasized this very purpose through its announcement that "* * * the Institute is empowered to collect and disseminate information for the guidance of the action of the individual members in protecting themselves against fraud." Defendants' action was taken in a reasonable reliance upon the holdings of this Court in *Swift & Co.* v. *U. S.*, 196 U. S. 375, approving the adoption of rules which "in good faith are calculated solely to protect the defendants against dishonest and irresponsible dealers", and in *Cement Manufacturers Ass'n.* v. *U. S.*, 268 U. S. 588, that it "cannot regard the procuring and dissemination of information which tends to prevent the procuring of fraudulent contracts * * * as an unlawful restraint of trade * * *" (p. 604).

(4) As to the matter of mill selling policies, the Commission's own proof (C. Ex. 53) established that, notwithstanding the socially and economically useful function which wholesalers performed, many manufacturers indulged in the practice of selling to some retailers at the same price as they sold to the wholesale trade.

The effect of this practice was to subsidize unfairly the favored retailer through an unearned and unjustified discrimination as a competitor of the actual wholesalers; and this practice also inevitably created an unfair discrimination as between groups of retailers and in the ultimate outcome as against the consuming public.

Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, reads, in part, as follows (15 U. S. C. A., sec. 13):

> "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality * * * and where the effect of such discrimination may be substantially to lessen competition or

> tend to create a monopoly in any line of commerce or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *."

A practice by a manufacturer of selling at the same price level to wholesalers and to such retailers as were accorded the privilege or had the opportunity of buying from him, would create a treble discrimination, both unfair according to any proper standard of competition and unfair as an act or practice under Section 5a of the Federal Trade Commission Act, as well as being illegal under the Robinson-Patman Act just quoted.

In the first place, it would work a discrimination against the actual wholesalers because they had to carry the burdens of discharging the wholesaler's economic functions of distribution, whereas the retailer, who bought at the same price from the manufacturer, was freed for purposes of competition from all these burdens. In the second place, other retailers who were not accorded the privilege or did not have the opportunity of purchasing from a manufacturer who had such a mill selling policy, would be obliged to purchase from a wholesaler and thus pay a higher price than the aforesaid more fortunate retailer. In the third place, there would also result a discrimination as against the consumers because the consumers would not receive the economic equivalent of the unearned advantages derived through such a mill selling policy by the favored retailers.

(5) Notwithstanding the notorious commission of these unfair and illegal acts, established by the Federal Trade Commission's own proof in this case, the Commission did not suppress them. Instead, in 1939 it instituted this proceeding which has had the effect of nullifying the efforts of the industry to protect itself against them.

In an effort to show the dire plight to which wholesalers had been reduced by force of this illegal competition and of the failure of the Commission in its suppression, defendants, by their various Offers of Proof and Motion before the Commission to reverse the Trial Examiner's rulings on evidence, sought to show the conditions leading up to and necessitating the inauguration by the Institute of its defensive program. Their offers were designed to demonstrate both the conditions and abuses prevailing in the industry and the economic background and context in the light of which they had been forced by aggressive tactics within the industry to unite for protective—not retaliative—purposes (fols. 5185-94, 5497-5507, 4393-6, 4423-33, 790-1, 4758-9, 793-5, 4983-5, 584-615, *supra*).

In *Board of Trade of the City of Chicago* v. *United States*, 246 U. S. 231 (repeated in the *Appalachian* and numerous other cases), this Court said that with respect to the legality of a restraint of trade:

> "To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts" (p. 238).

So far as concerned the defendants' endeavor to disprove the charge that their methods of competition were unfair, defendants came within the familiar rule, many times declared, that in a statutory proceeding of this character "Whether the means used are fair or not depends upon the necessities of each case." *Butterick Publishing Co.* v. *F. T. C.*, 85 F. (2d) 522, page 526.

Defendants were in fact but erroneously charged with what, on this one-sided record, was represented to be an unlawful boycott. Even at that, however, both this and other courts have said:

> "So long as the particular agreement is not intended to and does not have the necessary effect of eliminating beneficial competition, a boycott designed to prevent the commission of an illegal act may be unobjectionable. *United States* v. *American Livestock Comm.*, 279 U. S. 435; *Swift & Co.* v. *United States*, 196 U. S. 375; *Butterick Publishing Co.* v. *Federal Trade Commission, supra; United States* v. *Sugar Institute*, 15 F. Supp. 817, 899, modified and affirmed 297 U. S. 553."
>
> *Millinery Creators' Guild* v. *Federal Trade Commission*, 109 F. (2d) 175, aff'd 312 U. S. 469 (p. 176).

(6) In the present case, having erroneously conceived defendants' case as one of unlawful boycott, instead of allowing them latitude to meet the burden of proof and contradiction thus mistakenly thrust upon them (*United States* v. *American Livestock Commission*, 279 U. S. 435), the Commission and the court below effectively curtailed, if not denied, the right of refutation.

The Commission's basicly erroneous conception of the law of the case (as we submit) even resulted in exclusion of proof that certain pretended wholesalers were in fact retailers (fols. 584-615).

The theory of the Commission and of the court below seems to have been that to warn of the pretense was to blacklist the pretenders and hence to be unfair to competition by pretense.

Under that mistaken theory proof of the pretense and of its falsity was, of course, irrelevant.

That theory we respectfully challenge as basicly erroneous.

(7) The alleged inability of certain buyers in certain instances to buy goods at the manufacturer's price to wholesalers, relates to less than a dozen buyers.

Vital evidence of the petitioners on the issue of whether or not these buyers were dishonestly masquerading as wholesalers and on the issue of whether or not their type of competition was dishonest, was excluded (fols. 584-615).

No case has held that it is legal for buyers to misrepresent that they are wholesalers in order to deceive manufacturers into selling them at the wholesale price.

The act of a concern in representing itself to be a wholesaler when it is not such in fact, has been held unlawful. (*L. & C. Mayers Co., Inc.* v. *Federal Trade Commission*, 97 Fed. (2d) 365, 366 (C. C. C. 2nd).)

(8) Furthermore, information activities, such as petitioners', may properly bring to light trade information and trade evils, entirely apart from any question of whether the information or trade evils disclosed involve any violation of positive law. For example, in *Cement Manufacturers Protective Association* v. *U. S.*, 268 U. S. 588, the Court sustained the right of the Association to furnish credit information about customers of manufacturers. As stated in the information program case of *Sugar Institute* v. *U. S.*, 297 U. S. 553, 598 (1936):

> "And cooperative endeavor may appropriately have wider objectives than merely the removal of evils which are infractions of positive law."

(9) In determining whether the Commission committed reversible error in excluding evidence, the true test is not whether the admission of the evidence would necessarily lead to a different result, but whether its admission might induce the Commission to reach different results. *Fresh Grown Preserve Corp.* v. *F. T. C.*, 125 F. 2nd 917 (C. C. A. 2nd, 1942); *N. L. R. B.* v. *Indiana & Michigan Electric Company*, 318 U. S. 9 (1943).

POINT II

The Circuit Court misinterpreted and misapplied *Eastern States Lumber Ass'n* v. *U. S.*, 234 U. S. 600, the authority upon which it purported to act in sustaining the Federal Trade Commission's order.

(1) We respectfully submit that the extreme interpretation of that decision by the Circuit Court of Appeals overlooks:

(a) That case was decided before the enactment of *either* the Federal Trade Commission Act *or* the Clayton Act—and, of course, before the Wheeler-Lea and Robinson-Patman Act amendments—all of which Acts and amendments declared a legislative policy rendering illegal the unfair competition and discrimination against which the defensive measures were adopted here.

(b) That case necessarily did not involve the specific statutory issue presented here baldly for the first time, *i. e.*, Is it, of itself alone, an "unfair method of competition" for members of an industry to resist, by a united front, the efforts of their lawbreaking competitors whose effect was to injure them by unlawful discrimination and illegal competition?

(c) That case must be read with many subsequent decisions by this Supreme Court upholding programs by an industrial group for enlightenment as to fraudulent, immoral and unethical practices.

(2) The *Eastern States* case, unlike the present case, did not present an instance of defensive measures against those who sought to secure, deceptively and even illegally, commercial advantages by pretending to be what they were not.

In the *Eastern States* case the program was, through listing the wholesalers who dealt directly with the consumer, to exclude such wholesalers from the patronage of the combining retailers. There, unlike the present instance, the action condemned was not aimed at fraudulent or illegal competition as in the case at bar. It was not undertaken in self-defense against immoral or unethical action. On the contrary, it was directed against legitimate and open dealing on the part of other members of the industry. There was no subsidizing by a manufacturer of a retailer by giving him the wholesale differential for a function which he did not perform.

Furthermore, in that case all retailers who were members of the Association were (as this Court later pointed out in the *Maple Flooring* case, 268 U. S. 563, 579) by their agreement with the Association expressly "*required* to report to the Association" all instances where any wholesaler sold direct to consumers in their locality; and thereupon such wholesalers so reported were placed on a circularized list. There was no such requirement in the instant case.

This Court quoted as cogent to the result reached the concession made by the Association's counsel that the purpose and effect of its program was (p. 609):

> "* * * to cause retailers receiving these reports to withhold patronage from listed concerns. That was of course the very object of the defendants in circulating them."

The following also was part of the plan, as described by the Association's own counsel (p. 608):

> "Should any wholesaler desire to have his name removed from the list he can have it done upon satisfactory assurance to the local secretary that he is no longer selling in competition with the retailers."

Moreover, in the *Eastern States* case the Court said (p. 612):

> "This record abounds in instances where the offending dealer was thus reported, the hoped for effect, unless he discontinued the offending practice, realized, and his trade directly and appreciably impaired."

On the strength of this proof and of these concessions as to plan, intent and effect by counsel for the Association itself, the Supreme Court found that there was a wrongful boycott, and said (p. 611):

> "Here are wholesale dealers in large number engaged in interstate trade upon whom it is proposed to impose as a condition of carrying on that trade that they shall not sell in such manner that a local retail dealer may regard such sale as an infringement of his exclusive right to trade, upon pain of being reported as an unfair dealer to a large number of other retail dealers associated with the offended dealer, the purpose being to keep the wholesaler from dealing not only with the particular dealer who reports him but with all others of the class who may be informed of his delinquency."

(3) Equally inapposite is *Fashion Originators Guild* v. *Trade Commission*, 312 U. S. 457, pressed by the Commission on the court below. There (to quote the opinion, p. 461) manufacturers of women's garments admitted "that to destroy such competition they have in combination purposely boycotted" all parties who bought copied dress designs, irrespective of whether they had done so innocently or not.

That case, like its companion case, *Millinery Creators Guild* v. *Trade Commission*, 109 F. (2d) 175, affirmed 312 U. S. 469, involved (see 109 F. (2d) p. 177) "concerted action aimed at abolishing socially useful types of competition."

In the case at bar the types of competition involved were illegal, fraudulent, unethical or discriminatory competition,—not "socially useful types".

(4) Defendants respectfully assert that it is no answer to their contentions—at least not under our present form of social order—to say, as the Commission has elsewhere intimated (see its brief on application to this Court for Writ of Certiorari in *Millinery Creators Guild, Inc.* v. *F. T. C.*), that these defendants have only *two* "choices"—

(a) Either they must sit supinely by awaiting their deliverance through the paternalistic intervention of whatever benevolent governmental agency may in due time be moved to help them, or else

(b) They must resort to the alternative, both inadequate and futile, of attempting to repel mass attacks of unfair competition by bringing isolated injunction suits against a host of offenders.

POINT III

The Circuit Court's misinterpretation of the doctrine of *Appalachian Coals, Inc.* v. *U. S.*, 288 U. S. 344, which fully justifies the defendants' action here, aside from resulting in a denial of a fair trial, has or will produce a conflict and confusion, having grave public consequences, as to the status of this Court's decisions, with respect to the rights of industry to cooperate for its own protection against unethical or illegal competition and unlawful trade practices.

Within the express sanction of the *Appalachian* case and kindred decisions of this Court these defendants legitimately "were engaged in a fair and open endeavor to aid the industry in a measurable recovery from its plight" (p. 372).

Within the express sanction of the *Appalachian* case and kindred decisions of this Court these defendants' protective measures were legitimately undertaken for the purpose of "putting an end to injurious practices and the

consequent improvement of the competitive position of a group of producers" (p. 374).

Within the express sanction of the *Appalachian* case, it was "necessary in this instance to consider the economic conditions peculiar to the * * * industry, the practices which have obtained, the nature of defendant's plan * * *, the reasons which led to its adoption" (p. 361).

The rejection, therefore, of these defendants' offers of proof and motion to adduce additional evidence along the lines approved by this Court's decision in that and other kindred cases, resulted, we respectfully submit, in a denial to them of a fair trial.

In *Sugar Institute* v. *United States*, 297 U. S. 553, this Court both recognized and applied the doctrine of the *Appalachian* case, saying (p. 598):

> "Voluntary action to end abuses and to foster fair competitive opportunities in the public interest may be more effective than legal processes. And cooperative endeavor may appropriately have wider objectives than merely the removal of evils which are infractions of positive law. Nor does the fact that the correction of abuses may tend to stabilize a business, or to produce fairer price levels, require that abuses should go uncorrected or that an effort to correct them should for that reason alone be stamped as an unreasonable restraint of trade."

POINT IV

Moreover, the Circuit Court's decision is also in conflict with the decision of this Court in *Maple Flooring Ass'n* v. *U. S.*, 268 U. S. 563.

The basic position of the Circuit Court in sustaining the Commission's order as to the mill selling policy service is "that a combination existed not to buy of manufacturers who dealt with retailers on the same terms on which they dealt with wholesalers." In other words, that a combination to boycott existed.

But in the case at bar there is no evidence that even in a single instance any manufacturer lost the business of a member of the Institute, or of any improper use being made by petitioners of the information in the mill selling policy service so as to cause any change in any manufacturer's general sales policy.

Speaking of what will make illegal a program that is informational in form, this Court stated in *Maple Flooring Ass'n* v. *U. S.* 268 U. S. 563, 583:

> "Restraint upon free competition begins when improper use is made of that information through any concerted action which operates to restrain the freedom of action of those who buy and sell."

In no previous case has a combination not to buy, in effect a combination to boycott, been held to exist by this Court, without proof of overt acts of not buying or overt acts of boycott, by members of the alleged combination.

Furthermore, in *Cement Manufacturers Ass'n* v. *U. S.*, 268 U. S. 588, this Court said (pp. 603-6):

> "* * * in our view, the gathering and dissemination of information which will enable sellers to prevent the perpetration of fraud upon them, which information they are free to act upon or not as they choose, cannot be held to be an unlawful restraint upon com-

> merce, even though in the ordinary course of business most sellers would act on the information and refuse to make deliveries for which they were not legally bound. * * *
>
> "It (the record) fails to show any effect on price and production except such as would naturally flow from the dissemination of that information in the trade and its natural influence on individual action."

In the case at bar the Commission has not found, nor has the Court below pointed out, any evidence of dealings with manufacturers by members of the Institute on the basis of the mill selling policy reports different from the kind of buying which "would naturally flow from a dissemination of that information." There is no evidence of such different kind of action in the record.

The Court below, in striking down the mill selling policy service on the sole basis that a combination existed among the members of the Institute not to buy and without proof of any different kind of buying than would naturally flow from the information itself, has (we respectfully submit) decided this basic point, in conflict with the decisions of this Court in the above cases.

Is it plausible, in the case of a program which has been in operation over ten years that an accompanying combination not to buy, if it existed, would fail to produce a single instance of action, concerted or otherwise, on the part of members in withdrawing patronage from manufacturers who pursued the type of general sales policy against which the alleged combination was directed?

Furthermore, the proof in this case does not present any instance where any manufacturer changed his general sales policy as a result of petitioner's activities. It is confined, so far as any showing of any effect attributable to defendants' program, to a limited group of individual instances where manufacturers stopped selling on a wholesale basis to concerns which were discovered not in fact to be wholesalers.

Petitioner's defenses as to these comparatively few individual instances where manufacturers refused to sell on a wholesale basis to concerns which were not in fact wholesalers are: (1) That such refusals were the voluntary decisions of such manufacturers in the light of the information received, (2) that these masquerading concerns were engaged in dishonest, illegal and discriminatory conduct; and (3) that these defendants had the right for purposes of self-defense to gather and disseminate the information.

Dated, December 29, 1943.

Respectfully submitted,

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[APPENDIX FOLLOWS]